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No. 81-35

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1981

JACK VAN HYNING,

Appellant,

v.

UNIVERSITY OF ALASKA,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF ALASKA

VAN HYNING'S REPLY TO MOTION TO DISMISS APPEAL

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QUESTION PRESENTED

Can the highest court of a State avoid a holding of the United States Supreme Court recognizing procedural due process for college faculty in tenure proceedings by *sua sponte* requiring for standing that an unrepresented, six year employed, mandatory "tenure or out" faculty member have first appeared without meaningful notice before the body that determined him to be incompetent and which denied him the due process of law?

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COMMENT ON APPELLEE'S STATEMENT OF THE CASE

The University incorrectly asserts:

> Following the denial of tenure, Van Hyning accepted a terminal one-year contract of employment with the U of A and thereafter voluntarily resigned from the U of A faculty effective June, 1973. [R. 155] However, Van Hyning has continued since then to teach on a part-time basis at the U of A. [R. 36-37] Van Hyning never applied for employment at any other academic institution following his resignation from the U of A. [R. 34] (Motion to Dismiss p. 3-4).

The University's statement to the effect that Van Hyning continued teaching on a part-time basis at the University of Alaska is misleading. The portion of the record cited by the University is a discovery 'nterrogatory here set forth in full (R-36-37):

10.Q State whether or not you have been employed since you left employment with the University of Alaska, and if so, state with respect to each such employment:

(a) The name, address, and telephone number of such employer;
(b) The dates of your employment with such employer;
(c) Your monthly salary;
(d) The name of your immediate supervisor;
(e) Type of work done;
(f) The reason for termination.

A. Plaintiff was employed as a part-time Lecturer or Adjunct Associate Professor in Fisheries Biology.

(a) University of Alaska, Department of Wildlife & Fisheries and Department of Military Extension. 479-7161
(b) Spring semesters 1974, 1975 and 1976.
(c) Variable depending on credit hours taught.
(d) Dr. Samual Harbo.
(e) Teaching fisheries courses.
(f) End of semester.

The record shows Van Hyning taught only one part-time course in the spring semesters of 1974, 1975 and 1976. Van Hyning has not applied for employment at any other academic institution as he does not want to leave the State of Alaska.

The University policy for CONDITIONS FOR THE GRANTING OF TENURE (6a-8a Jurisdictional Statement) clearly and specifically states that it is "Tenure or Out." Van Hyning is out forever. Through sympathy, compassion, or otherwise, Van Hyning was allowed to be a part-time lecturer in a single course for three semesters.[1]

As *stipulated* below Van Hyning's resignation was less than voluntary:

> "As the direct and proximate result of plaintiff's being denied tenure he resigned from the University of Alaska effective June 30, 1973 in an effort to reduce the professional impact of the denial of tenure. Accordingly, plaintiff stopped teaching at the University of Alaska on June 30, 1973." (20a Jurisdictional Statement).

This resignation was prompted at Van Hyning's Dean's suggestion, *infra.*

The University is further in error when it states: "A candidate who is denied tenure during his fifth year of service could request reconsideration of the decision by the president and appeal the result to the Grievance Committee of the University Assembly." This statement is not supported by the record and is untrue. There is no appeal provided for or taken to any grievance committee. The Alaska Supreme Court did not hold that Van Hyning could or should have gone before any grievance committee. The tenure regulation does not provide for any appeal. The Alaska Supreme Court stated only: "Here Van Hyning did not appear before the tenure committee and did not take his case to the president after the tenure

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[1]Since the filing of appeal to this Court Van Hyning was asked to fill in for another faculty member for a semester at two thirds pay without fringe or retirement benefits.

committee had made its unfavorable recommendation." (3a Jurisdictional Statement).[2]

The University's statement that Van Hyning never attempted to find out why he was denied tenure is also contrary to the record. It was when Van Hyning made inquiry as to why he was denied tenure that he was advised to resign:

Q. Dr. Van Hyning, when you were first denied tenure, did you inquire of the University, or any individual at the University, as to why you were denied tenure?
A. I inquired of my immediate supervisor, Dean of College.
Q. Who was that, sir?
A. Dr. Dean was the department head and Dean Kessel was the Dean of the College.
Q. Which one did you inquire of?
A. Mainly, Dr. Kessel, we had a conversation.
Q. Can you recall when that conversation took place?
A. Within a week or two after I heard of the decision.
Q. What did Dr. Kessel tell you?
A. At that time she said, "Well, you just didn't produce enough. Your teaching was judged to be not up to our standards. You just didn't produce enough research" or words to that effect.[3]

[Deposition of Jack Van Hyning, P. 12, Lines 5-20]

* * *

Q. So you never then filed any appeal of your denial of tenure with the University.
A. No, I was never informed what the procedure was, or if I could, if it would be desirable, or any guidance as to what I might do.[4]

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[2]This statement is puzzling inasmuch as it *was* the president who denied tenure.

[3]No more specific reasons have ever been given.

[4]No appeal is provided for. Van Hyning was unrepresented prior to filing suit.

Q. Did you ever discuss with Dean Kessel how you should go about filing an appeal of your denial of tenure?
A. No, we never talked about that specifically.
Q. At the time you were denied tenure, –
A. I might add that during the conversations she advised me that it was standard procedure for the person who was denied to resign from the University. It would look better on my record if I had a resignation rather than –
Q. She never told you that you must resign from the University, did she?
A. She didn't use the word "must," but she strongly advised it.
Q. Because she thought it might look better on your record.
A. Right.
[Jack Van Hyning Deposition, P. 13-14 Lines 22-25 & 1-14][5]

COMMENT ON APPLICABLE STANDARD OF REVIEW

Van Hyning does not quarrel with the authorities cited by the University. This very authority supports the Court's giving this case plenary treatment. As stated in *Wolfe v. North Carolina*, 364 U.S. 177, 185 (1960) (University's Motion at p. 6) a State Court,

> "may not avoid federal claims on the basis of non-federal grounds: (1) which lack "fair or substantial support," *Wolfe v. North Carolina*, 364 U.S. 177, 185 (1960); (2) which violate federal due process standards, *Bouie v. City of Columbia*, 378 U.S. 347, 354-55 (1964); (3) which constitute an "evasion" of federal rights, *Rogers v. Alabama*, 192 U.S. 226, 230-31 (1904); (4) which interpose "unreasonable obstacles" to the assertion of federal rights, *Davis v. Wechsler*, 263 U.S. 22, 24-25 (1923); (5) which "discriminate" against federal rights, *Wolfe v. North Carolina*, 364 U.S. 177, 192 (1960); or (6) which constitute an "arid ritual of meaningless form," *Staub v. City of Baxley*, 355 U.S. 313, 320 (1958). See, generally,

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[5]This testimony was unrebutted and formed the basis of the trial stipulation set forth on 20a of the Jurisidictional Statement and above.

Wright and Miller, Federal Practice & Procedure §4021-28 (1977)."

This is specifically what the Alaska Supreme Court has done in requiring Van Hyning to have appeared as an urepresented, six year employed, mandatory "tenure or out" faculty member before the body that determined him to be incompetent. The Alaska Court has denied Van Hyning a reasonable opportunity to assert bonafide federal rights.

Curiously, *Matthews v. Eldridge*, 424 U.S. 319 (1976) as discussed at length by the University is not helpful to their position. Eldridge could have obtained *full* administrative review of the determination of his social security benefits but filed suit instead. At issue was "whether the denial of Eldridge's claim to continued benefits was a sufficiently 'final' decision with respect to his constitutional claim to satisfy the statutory exhaustion requirement." 428 U.S. 331. Pointing out that "a claim to a pre-deprivation hearing as a matter of right rests on the proper position that full relief cannot be obtained in a post-deprivation hearing" the Court concluded that the denial of the request for benefits constituted a sufficiently final determination. 424 U.S. 331.

The case at bar is considerably stronger in its finality. Van Hyning did exhaust all of the remedies described in the tenure bulletin, save asking for reconsideration of a record he did not have access to. Van Hyning did not do anything else as no appeal was provided for and he was advised to resign by his Dean.

This Court found that Eldridge's failure to raise his constitutional claim administratively did not prevent him from first raising it in court. The secretary had no power to amend the statute alleged as being unconstitutional and "it is unrealistic to expect that the secretary would consider substantial changes in the current administrative review system at the behest of a single aid recipient raising a constitutional challenge in an adjudicutory context. The secretary would not be required even to consider such a challenge." 424 p. 330. So with Van Hyning and his complaints. Neither the tenure committee, the president of the University, or any purported

grievance committee had the authority to change the tenure bulletin as adopted by the Board of Regents. This tenure bulletin by stipulation does not provide for procedural due process and that is specifically what Van Hyning was requesting.

The substantive discussion in *Eldridge* is helpful to Van Hyning's cause in restating the desirability for a procedural due process hearing *prior* to the deprivation of a property interest. To suggest that Van Hyning has not raised any colorable claim that an erroneous tenure decision by the University of Alaska damaged him in any way not recompensable through retroactive relief denies that the tenure policy specifically provides that it "will be rigorous providing assurance the persons of doubtful qualifications will not be retained."

The University of Alaska asserts that an unsuccessful peer review which is "rigorous providing assurance that persons of doubtful qualifications will not be retained," is really the same as neutral non-retention. Certainly this is the issue of the case. The articulation of the question states the answer. It was tenure or out and Van Hyning is out.

The University further argues that *Board of Regents v. Roth*, 408 U.S. 564 (1972) and *Perry v. Sindermann*, 408 U.S. 593 (1972) are not applicable. Nowhere, however, does the University discuss the following quotation from *Roth:*

> Similarly, there is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. *The State, for example, did not involve any regulations to bar the respondent from all other public employment in State universities. If it had done so, this again would be a different case. For 'to be deprived not only of present government employment but of future opportunity for it is no small injury' (Citations omitted.) The Court has held, for example, that a state, in regulating the eligibility for a type of professional employment, cannot foreclose a range of opportunities 'in a manner . . . that contravenes due process.' (Citation*

omitted) And, specifically, in a manner that denies the right to full prior hearing (Citation omitted) Ibid, 408 U.S. 573-574; (emphasis supplied).

This is that different case. Van Hyning can never again be employed at the University of Alaska.

COMMENTS ON REMAND SUGGESTION

The trial court found that Van Hyning's federal constitutional claims were barred by a two year tort statute of limitations and were lacking in merit.[6] Van Hyning argued before the Alaska Supreme Court that the University faculty bulletin on tenure (Appendix II, Jurisdictional Statement) was by specific definition made a portion of Van Hyning's yearly contracts of employment and therefore his cause of action lay in contract and not exclusively tort. Van Hyning was required to submit to the tenure process as a condition of employment. In its opinion the Alaska Supreme Court adopted Van Hyning's reasoning: "This contract was renewed in 1968, 1969, 1970 and 1971. The University's tenure policy, *incorporated into Van Hyning's contract,* provides that if tenure is not granted at the end of a probationary period, not to exceed six years, a terminal contract may be offered to the probationary employee. One who has been denied tenure is thereafter ineligible for full-time employment at the University." (1a, 2a Jurisdictional Statement).

In order to reach any perceived exhaustion issue the Alaska Supreme Court necessarily had to find that the action itself was timely brought. There is no need to remand for any determination as to the applicable statute of limitations inasmuch as this question has already been ruled upon.

Notwithstanding, this Court may properly determine whether a claim for violation of federal constitutional rights constitutes tort, contract, or both. See *Orr v. Orr* 440 U.S. 268 (1979). As in *Orr,* it is clear the Alaska Court did address the

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[6]Alaska has a two year Statute of Limitations for tort (A.S. 09.10.070) and a six year Statute of Limitations for Contract (A.S. 09.10.050).

Statute of Limitations issue when if found that the tenure regulations were incorporated within Van Hyning's contract.

The federal constitutional due process issue was functionally decided as well by the Alaska Court when it found that Van Hyning should have first appeared without representation and meaningful notice before the body that determined him to be incompetent and which denied him the due process of law. "[I]t is irrelevent to inquire . . . when a federal question was raised in a court below when it appears that such question was actually considered and decided." (Citations omitted, 440 U.S. 274-75).

CONCLUSION

For the foregoing reasons this court should note probable jurisdiction and allow Van Hyning to brief the merits of his case and argue.

DATED at Anchorage, Alaska this 25th day of September, 1981.

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